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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Linda Conley; Heriberto Dominguez and
Yoami Dominguez, husband and wife;
Stephen Frakes; James C. Kemp
and Reyna Kemp, husband and wife;
Michelle Norris; William Ponce; and
Herlan Yeomans and Eloina Yeomans,
husband and wife,

Plaintiffs,

vs.

Town of Quartzsite, a political
subdivision; Alex and John Doe Taft;
Jeffrey and Jane Doe Gilbert; and Albert
and Jane Doe Johnson,

Defendants.

Case No. 2:11-cv-01637-PHX-MEA

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1 Defendants Town of Quartzsite, Alex Taft, Jeffrey Gilbert, and Albert Johnson
2 (“Defendants”) move for summary judgment on all claims.¹

3 This is an employment case arising from the termination of six employees of the
4 Police Department for making allegations of misconduct by the Chief of Police, Jeff
5 Gilbert, that were found to be recklessly false. [SOF 3-5, 44, 47, 49, 62, 128-36, 137,
6 175-77, 178-79, 182, 186-97]² All of Plaintiffs’ claims fail as a matter of law.

7 **I. PLAINTIFFS CANNOT SATISFY THE *MONELL* STANDARD.**

8 Plaintiffs’ Section 1983 claims should be dismissed because they cannot, as a
9 matter of law, meet the standard for municipal liability. A local government may not be
10 held liable under 42 U.S.C. § 1983 based on the theory of respondeat superior or
11 vicarious liability. Instead, to establish municipal liability, a plaintiff has the burden of
12 proving that (1) the alleged unconstitutional act was committed pursuant to a formal
13 governmental policy or longstanding practice or custom, or (2) the violation was
14 committed or ratified by an official with final policy making authority. *See Monell v.*
15 *Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). Plaintiffs cannot satisfy this requirement.

16 Here, the record is devoid of any facts even remotely suggesting that the Town has
17 a formal policy or longstanding custom of retaliating against employees for engaging in
18 protected speech. Thus, the viability of Plaintiffs’ First Amendment claims rests on their
19 ability to show that their terminations were committed or ratified by a final policymaker.
20 Based on the undisputed evidence, Plaintiffs cannot meet this burden.

21 To qualify as a final policymaker, it is not enough that an individual has authority
22 to make employment decisions, such as terminating employees for misconduct. As the
23 Ninth Circuit has explained:

24 Municipal liability does not attach. . . unless the decisionmaker possesses
25 final authority to establish policy with respect to the action ordered. The
fact that a particular official - even a policy-making official - has discretion

26 ¹ Because the parties have filed a stipulation to dismiss the claims of Heriberto
27 Dominguez, with prejudice, Defendants have not addressed Dominguez’s claims in this
motion.

28 ² The factual background is described in detail in Defendants’ Statement of Facts in
Support of Motion for Summary Judgment (“SOF”).

1 in the exercise of particular functions does not, without more, give rise to
municipal liability based on an exercise of that discretion.

2 *Gillette v. City of Eugene*, 979 F.2d 1342, 1349 (9th Cir. 1992). In this case, the
3 undisputed evidence shows that the Assistant Town Manager, Al Johnson, was the sole
4 decisionmaker with respect to the termination of Plaintiffs' employment. [SOF 2, 195,
5 198-99] Plaintiffs' § 1983 claims fail as a matter of law because Johnson did not have
6 final policy-making authority, as defined by the Ninth Circuit. Significantly, there is no
7 evidence that Johnson was empowered to create personnel policies for the Town.
8 Instead, only the Town Council possessed such policy-making authority. [SOF 204]

9 In fact, the Town Council exercised its authority by adopting, through a resolution,
10 a merit system and a comprehensive Personnel Policy that sets forth the appropriate
11 grounds for disciplinary action and states that employees may only be dismissed "for
12 cause." [SOF 204-05, 207] Furthermore, the Personnel Policy expressly states that it
13 may only be amended by the Town Council. [SOF 206] In other words, Johnson's
14 authority to discipline or terminate employees was constrained by policies that were
15 implemented by the Town Council, thus confirming that he does not qualify as a final
16 policymaker. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("When an official's
17 discretionary decisions are constrained by policies not of that official's making," such
18 official is not a final policymaker for purpose of municipal liability).

19 As further evidence that Johnson did not have policymaking authority, his decision
20 to discharge Plaintiffs was subject to appeal to the Town's Personnel Advisory Board
21 (and subsequently the Town Manager) for a determination of whether good cause existed
22 for the terminations under the Town's policies. [SOF 208] As the Supreme Court has
23 held, an employee is not a final policymaker if his decisions are subject to a higher level
24 review "to measure the official's conduct for conformance with [personnel] policies."
25 *Praprotnik*, 485 U.S. at 127; *see also Scala v. City of Winter Park*, 116 F.3d 1396, 1401
26 (11th Cir. 1997) (holding that a city manager and his subordinate were not final
27 policymakers because a civil service board had the authority to review the plaintiff's
28 termination); *Moore v. County of L.A.*, 2012 U.S. Dist. LEXIS 115193, at *11 (C.D. Cal.

Aug. 15, 2012) (“Plainly, whatever discretion Cooley and other DA’s Office officials wield is constrained by policies not of their making, and is subject to review by the Board. Thus, Cooley and other officials at the DA’s Office are not final policymakers for the County under *Monell* as a matter of law.”) (internal citation omitted). These precise circumstances exist here. For this additional reason, Plaintiffs cannot establish municipal liability.

In sum, because Johnson was not a final policymaker, Plaintiffs cannot prevail on their Section 1983 claims against the Town. Instead, the Town is entitled to summary judgment based on this fatal infirmity. *See, e.g., Gillette*, 979 F.2d at 1349 (granting judgment in favor of city on due process claim because fire chief who made termination decision did not have authority to establish personnel policies); *Cooke v. Lake Havasu City*, 2010 U.S. Dist. LEXIS 66144 (D. Ariz. July 1, 2010).³

II. PLAINTIFFS DID NOT ENGAGE IN PROTECTED SPEECH.

To establish a *prima facie* case of First Amendment retaliation, Plaintiffs must prove that (1) they engaged in constitutionally protected speech; and (2) their protected speech was a substantial or motivating factor in the City’s decision to terminate their employment. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Defendants are entitled to summary judgment on the First Amendment claims because Plaintiffs cannot meet their initial burden of demonstrating that they engaged in protected speech.

Government employers are empowered to regulate speech that is disruptive to the management of personnel and internal affairs. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146-148 (1983). The broad discretion given a government employer to effectively manage its operations was recently emphasized by the U.S. Supreme Court:

[An employee’s speech] may seek to achieve results that ‘contravene governmental policies or impair the proper performance of governmental

³ Plaintiffs’ “official capacity” claims against the individuals should be dismissed for the same reasons. A suit against a governmental officer in his or her official capacity is equivalent to a suit against the governmental entity itself. *Monell*, 436 U.S. at 691.

functions.’ *Garcetti*, 547 U.S., at 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689. Government must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve. A petition, like other forms of speech, can bring the ‘mission of the employer and the professionalism of its officers into serious disrepute.’ *Roe*, 543 U.S., at 81, 125 S. Ct. 521, 160 L. Ed. 2d 410. A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That behavior could cause a serious breakdown in public confidence in the government and its employees. And if speech or petition were directed at or concerned other public employees, it could have a serious and detrimental effect on morale.”

Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495-2496 (2011).

Thus, to resolve a First Amendment claim by a municipal employee, this Court must perform a balancing test to determine whether the interest of the government employer “in promoting the efficiency of the public services it performs through its employees” outweighs the employee’s interests, as a citizen, “in commenting upon matters of public concern.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Pertinent considerations in this balancing test are “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.” *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *see also Brewster v. Board of Educ.*, 149 F.3d 971, 979 (9th Cir. 1998) (“[C]ourts must give government employers wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.”) Significantly, the *Pickering* “balancing test is a question of law, not fact,” and therefore is an appropriate matter to be resolved on summary judgment. *Carboun v. Chandler*, CV-03-2146-PHX-DGC, 2005 U.S. Dist. LEXIS 21950, at *14 (D. Ariz. Sept. 27, 2005).

When applying the *Pickering* test, courts give substantial deference to a governmental entity’s judgment in making personnel decisions concerning a police

department. *See, e.g., Aguilera v. Baca*, 510 F.3d 1161, 1171 (9th Cir. 2007) (“Law enforcement agencies are entitled to deference, within reason, in the execution of policies and administrative practices that are designed to preserve and maintain security, confidentiality, internal order, and esprit de corps among their employees.”); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000) (“[T]he unit of government in which appellees worked was a police department, a quasi-military organization. Discipline and esprit de corps are vital to its functioning. Given that ‘a wide degree of deference to the employer’s judgment is appropriate’ when ‘close working relationships are essential to fulfilling public responsibilities,’ the balance of interests tips in favor of the City.”); *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) (police department “has a substantial interest in developing discipline, *esprit de corps*, and uniformity...to insure adequate promotion of safety of persons and property”). When this standard is applied, the inescapable conclusion is that Plaintiffs’ speech was unprotected as a matter of law.

A. Plaintiffs Are Not Entitled To First Amendment Protection For Their Recklessly False Allegations Of Misconduct By Chief Gilbert.

Quite frankly, it is difficult to imagine a case where the balance weighs more heavily in favor of the government employer. On the Plaintiffs’ side, any purported First Amendment protection is significantly diminished based on, among other things, the fact that Plaintiffs made recklessly false allegations of unethical (and possibly criminal) conduct by Chief Gilbert in connection with his use of sick and vacation time. *Ceballos v. Garcetti*, 361 F.3d 1168, 1179 (9th Cir. 2004) *reversed on other grounds by Garcetti v. Ceballos*, 547 U.S. 410 (2006) (“[T]he recklessness of the employee and the falseness of the statements should be considered in light of the public employer’s showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.”). Here, the Plaintiffs claimed responsibility for an anonymous letter to Arizona Peace Officer Standards and Training Board (“AZ POST”) – the entity responsible for regulating the peace officer profession – which alleged that:

1 Chief Jeff Gilbert accrues “sick” and “vacation” time but when he chooses
2 to take time off which is a substantial amount of time, he doesn’t report the
3 time. He never uses any of his “sick” or “vacation” time. He doesn’t even
4 complete a time sheet, if he does complete one, it has only been recently.

5 [SOF 38, 44, 47, 49, 62] In reality, the overwhelming and undisputed evidence shows
6 that these allegations – which provided the basis for Plaintiffs’ terminations – were
7 utterly false. [SOF 191-92, 194] As an initial matter, it is uncontroverted that Chief
8 Gilbert used 128 hours of vacation time and 12 hours of sick leave from June 17, 2009 to
9 April 5, 2011 – the period leading up the AZ POST letter. [SOF 137] Thus, there is no
10 merit to the contention that he *never* used his accrued time off. It is also undisputed that
11 Chief Gilbert obtained verbal and written approval from the Town Manager to use his
12 sick and vacation time. [SOF 132, 137] Furthermore, as an exempt employee, Chief
13 Gilbert was *not* required to complete a time sheet. [SOF 128-29] As such, the
14 insinuation that the Chief engaged in misconduct by failing to record his hours is patently
15 misleading. Moreover, both Chief Gilbert’s employment contract and the Town’s
16 Personnel Policy gave him latitude to take time off under certain circumstances without
17 using accrued leave, and the Town Manager expressly approved 40 hours of such time
18 off in September 2009. [SOF 130, 133-35]

19 Not only did Plaintiffs falsely accuse Chief Gilbert – the highest ranking law
20 enforcement official in the Town – of essentially stealing from the Town, but they were
21 reckless in doing so. Plaintiffs were virtually uniform in conceding that they lacked
22 personal knowledge as to whether Chief Gilbert had misused his sick or vacation time.
23 [SOF 35, 50, 142, 145, 147-48, 150, 161, 173-74] To make matters worse, Plaintiffs
24 were aware that the very same issue was investigated by the Arizona Department of
25 Public Safety (“DPS”) in 2010, and that there was no finding of wrongdoing. [SOF 26-
26 36, 48] In fact, Chief Gilbert held a department meeting in which he informed Plaintiffs
27 that he had been exonerated by DPS, and Plaintiffs had no reason to disbelieve him.
28 [SOF 33-36] After the meeting, Plaintiffs did not acquire any new information
suggesting that the Chief was misusing his sick or vacation time, yet Plaintiffs were

1 undeterred from resurrecting the same stale allegation in the AZ POST letter. [SOF 51]

2 Not only did Plaintiffs disregard the results of the DPS investigation, but they
3 made no effort whatsoever to independently determine whether the Chief had engaged in
4 misconduct. For instance, they did not research whether the Chief was an exempt
5 employee who was not required to record his time. [SOF 143-44, 153, 157, 162, 164,
6 167] Plaintiffs also did not bother to review the Chief's contract (which was a public
7 record), despite the fact that many of them attended Town Council meetings where the
8 contract was up for renewal, and therefore were keenly aware that the Chief's
9 employment was governed by the terms of a written agreement. [SOF 136, 138-41, 151-
10 52, 155, 165, 168] Had they done so, they would have immediately recognized that the
11 Chief had a contractual right to take paid leave without using sick or vacation time. [SOF
12 133-34]

13 The Plaintiffs' failings did not stop there. They also neglected to track the Chief's
14 working hours or days, or to make any effort to ascertain how much time he took off.
15 [SOF 146-47, 149, 154, 156, 158, 160, 163, 170-72, 190] Moreover, in another
16 inexcusable oversight, they never spoke to the Town Manager about whether the Chief
17 was misusing his sick or vacation time. [SOF 159, 166, 169] Had they done so, the
18 Town Manager could have easily clarified that the Chief submitted numerous requests to
19 use sick and vacation time, which she personally approved. [SOF 27, 138, 190] Thus, it
20 comes as no surprise that Plaintiffs were admittedly ignorant of whether there was any
21 merit to the allegation that Chief misused sick or vacation leave. [SOF 35, 50, 142, 145,
22 147-50, 153, 161, 173-74]

23 In sum, Plaintiffs' allegations regarding the Chief's use of sick and vacation time
24 were based on nothing more than unsupported speculation and conjecture. Because
25 Plaintiffs were, at a minimum, disturbingly reckless in making the false accusations in the
26 AZ POST letter, their speech is entitled to little (if any) protection. *Moran v.*
27 *Washington*, 147 F.3d 839, 849 (9th Cir. 1998) (recognizing that the falsity of speech
28 "undermines [a plaintiff's] First Amendment interest for balancing purposes").

B. Plaintiff's Speech Should Not Be Protected Because They Acted For Selfish Reasons.

Plaintiffs' speech is also unworthy of protection because they acted for selfish reasons, and *not* for the purpose of fostering public discourse. It is well-settled that speech that deals with individual personnel disputes and grievances is not protected. *See Connick*, 461 U.S. at 146-148; *Cochran*, 222 F.3d at 1201. As the Ninth Circuit has noted, courts must ask the following question when determining if speech rises to the level of a public concern: "Does the speech 'seek to bring to light actual or potential wrongdoing or a break of public trust,' or is it animated instead by 'dissatisfaction' with one's employment situation?" *See, e.g., Desrochers v. City of San Bernardino*, 572 F.3d 703, 715 (9th Cir. 2009). Here, the undisputed evidence shows that the Plaintiffs' speech was animated by a dislike for the Chief and a desire to protect themselves and improve their personal work environment – matters that do not relate to a public concern.

For instance, Kemp, Frakes, Ponce, and Norris testified that they complained to AZ POST because they were required to do so to avoid losing their certification as police officers. [SOF 37-43, 52-57] Kemp was, perhaps, the most blunt about it, admitting that he participated in the complaint, "to cover [his own] ass." [SOF 52] Thus, the undisputed evidence shows that Plaintiffs were acting within the scope of their duties as police officers, and for the purpose of preserving their own jobs – and not as "citizens." For these reasons alone, the Court should conclude that their speech was unprotected. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). Moreover, in a particularly candid admission, one Plaintiff testified that he did not care about what AZ POST did with his complaint – hardly the sentiment of someone who was attempting to raise issues of public concern. [SOF 53]

The record is replete with additional evidence that Plaintiffs acted based on purely

personal motives. For instance, Yeomans admitted that he joined in the complaint because he was dissatisfied with the way his own employment issues were handled by Chief Gilbert. [SOF 58] By the same token, Norris acknowledged that she was motivated by a desire to protect herself from becoming embroiled in a lawsuit relating to Chief Gilbert's alleged misconduct, and that she was hopeful that the complaints "would bring a better employment situation for [her] by making [her] work environment better." [SOF 59-60] Likewise, Ponce testified that the Chief's behavior made the work environment unpleasant for him, and that he believed things would improve under a new Chief of Police. [SOF 56] Indeed, Plaintiffs were hopeful that Chief Gilbert would resign or be fired because they were unhappy with his leadership, making their actions tantamount to a self-serving coup. [SOF 61, 203] In sum, the undisputed evidence confirms that Plaintiffs' complaint was the type of self-interested grievance that falls outside the purview of the First Amendment. *See, e.g., Desrochers*, 572 F.3d at 715 (holding that speech was unprotected based on undisputed evidence that plaintiffs "were motivated by their dissatisfaction with their employment situation brought on by 'a difference of personalities between the [plaintiffs] and Kimball. For example, [one plaintiff] forthrightly described his job as 'unrewarding' so long as Kimball was his supervisor.'").

C. Plaintiffs' First Amendment Rights Are Further Diminished Because They Raised Complaints In A Manner That Was Unnecessarily Disruptive.

Any purported First Amendment protection is also diminished because Plaintiffs ignored the chain of command. Instead, they chose to raise their complaints in a highly disruptive manner that involved AZ POST, the Town Council, and the citizens of Quartzsite, thus reducing any protectable interest. *See, e.g., Lytle v. City of Haysville*, 138 F.3d 857, 865 (10th Cir. 1998) ("In considering the time, place, and manner of the disputed speech, this circuit has considered whether the employee used less disruptive internal channels, rather than going outside the city administration."). [SOF 47, 63-64, 89-92, 96-99, 103-04, 109]

1 Plaintiffs admitted that they understood the critical importance of following the
 2 chain of command in the police department. [SOF 10, 20] In addition, Plaintiffs
 3 acknowledged receiving the Town's Personnel Policy, which sets forth the following
 4 framework for raising concerns:

5 A grievance is a complaint filed by a confirmed employee concerning
 6 circumstances thought by the employee to be unjust or incorrect. . . . If an
 7 employee feels he or she has a complaint, the complaint must first be
 discussed with the immediate supervisor. Every attempt should be made to
 resolve the complaint at the lowest level of supervision possible.

8 [SOF 45-46] Nevertheless, Plaintiffs brazenly disregarded the chain of command and
 9 Town policy by going directly to a third party agency, AZ POST, rather than using less
 10 disruptive internal channels. [SOF 47, 126] In fact, as confirmation that Plaintiffs'
 11 complaints were misdirected, AZ POST referred the matter back to the Town for
 12 investigation. [SOF 88]

13 To make matters worse, Plaintiffs then added fuel to the fire by using the threat of
 14 publicity as a weapon to achieve their goal of removing Chief Gilbert. Plaintiffs agreed
 15 to be listed as signatories on a letter to the "Mayor, Members of Town Council, [and]
 16 Town Manager," stating in part:

17 [M]embers of the Quartzsite Police Department, representing
 18 approximately 80% of the department, have made it known to members of
 19 the Town Council and other agencies our concerns involving conduct of
 20 [Chief Gilbert]. . . . We have notified you that we have a vote of "No
 21 Confidence" in his leadership. Left with little other choice, we have
 22 prepared the following press release to be submitted to the media within 24
 23 hours after delivery of this letter, along with a copy of the press release, to
 24 those who are listed above. We feel it is our duty to inform the citizens of
 this community and the rest of the public, that we do not stand behind Chief
 Gilbert. . . . As it is apparent to us that a vote of No Confidence in Chief
 Gilbert is not enough to ask for his resignation with cause, we feel that
 notifying our constituents of the kind of man and Officer that is being
 allowed to run the Quartzsite Police Department is the only avenue left to
 convince you to start an honest investigation into a serious matter.

25 [SOF 96-97] The letter included an attached press release, which stated in part:

26 We have notified the Mayor, members of the Quartzsite Town Council and
 27 AZ POST of town policy and criminal violations by [Chief] Gilbert. We
 28 have expressed a vote of "No Confidence" in his leadership, and have
 requested his resignation. . . . Members of the Quartzsite Police
 Department, in a show of unity and represented by AZCOPS, at the Town

Meeting on June 14th, 2011, will give a public statement of “No Confidence” in Police Chief Jeff Gilbert and our reasons for the vote.

[SOF 98] After attempting to coerce the Town into removing Chief Gilbert, Plaintiffs then made good on their threat by delivering the press release to several media outlets.

[SOF 99-100] In addition, Plaintiffs and their representatives made further efforts to publicize their complaints at a June 14, 2011 Town Council meeting, notwithstanding the fact that an independent investigation of Chief Gilbert was ongoing. [SOF 104, 109, 175-77] At the meeting, Plaintiffs wore red to show their opposition to Chief Gilbert, and distributed letters to the public that repeated many of their allegations of misconduct, thus further enflaming the situation. [SOF 104-05, 110]

In discussing the impact of Plaintiffs’ actions, the Assistant Town Manager stated:

I think the concerns could have been handled very simply as personnel matters rather than becoming, you know, dirty laundry in public. I think they very specifically could have been handled completely differently. Quite frankly, I really wish they would have been. The fact that they tried to do this in public took this out of our hands, and it cost the Town enormous amounts of money. . . . Most of the concerns of that letter were personnel matters that were just, we felt, very easily taken care of at a, you know, mid-management level, a supervisory – first-level supervisory level. Instead they got blown out of proportion. They got aired in the public, and it divided the department.

[SOF 127] Because Plaintiffs chose to raise their concerns in a disruptive and inappropriate manner, they are entitled to little or no First Amendment protection. The decision in *Belcher v. City of McAlester* is instructive on this issue:

Belcher could have used ‘less disruptive internal channels,’ *id.*, by explaining his concerns to his superior officers at the Fire Department and following the chain of command. Instead, Belcher chose to go outside the Department, speaking directly to Council members in violation of Department and City policy, diminishing the level of protection his speech might otherwise enjoy. . . . In sum, Belcher’s narrow interest in expressing his concerns through external channels, in violation of City and Department policy, when weighed against the heightened interest of the City and the Department in maintaining harmony among firefighters and their officers, tips the scales on the City’s side.

324 F.3d 1203, 1208-1209 (10th Cir. 2003). The same reasoning applies here with even greater force. As in *Belcher*, Plaintiffs disregarded the City’s Personnel Policy, which required them to raise their concerns through internal channels. However, they went well

beyond the scope of the disruptive conduct in *Belcher* – which involved a complaint to the City Council – by complaining to AZ POST, threatening to issue a press release as leverage to force the Town to remove Chief Gilbert, and then publicizing their allegations to the Town Council, the media, and the general public. [SOF 47, 89-92, 96-100, 104, 109]

In sum, Plaintiffs’ speech is unprotected because (1) they made recklessly false allegations against the Chief of Police; (2) they acted for self-interested reasons, and not for the purpose of fostering public discourse; and (3) they raised their allegations in an unnecessarily disruptive manner.

D. The Undisputed Evidence Shows That Plaintiffs’ Rights (If Any) Were Substantially Outweighed By The Disruptive Impact Of Their Speech.

In contrast to the limited (and possibly non-existent) value of Plaintiffs’ speech, the City had an overwhelming interest in preserving order, harmony, and discipline within the Police Department. Numerous courts, including the Ninth Circuit, have repeatedly recognized that police departments, as paramilitary organizations, are given the highest deference when applying the *Pickering* balance. *Cochran*, 222 F.3d at 1201. Here, Plaintiffs’ purported right to make disruptive and false allegations of misconduct by Chief Gilbert is dwarfed by the Town’s compelling interest in maintaining the orderly and efficient operation of the department responsible for public safety.

Significantly, the Ninth Circuit has held that, “in executing the *Pickering* balance, courts should not require government employers to demonstrate that the employee’s speech actually disrupted efficient office operation; rather ‘reasonable predictions of disruption’ are sufficient.” *Moran*, 147 F.3d at 846. Here, the Town had discretion to terminate Plaintiffs based on the likely ramifications of their actions, which involved false allegations of misconduct by the Chief of Police. The consequences of this type of speech are easy to recognize.

As Plaintiffs concede, police officers are held to a higher level of integrity, and it is important for the police department to have a good relationship with the public in order

1 to provide effective law enforcement services. [SOF 7-19, 23-25] Furthermore,
2 Plaintiffs understand that it is important for police officers to trust their colleagues, since
3 they may be required to rely upon them for back-up in potentially life-threatening
4 situations. [SOF 22] This concern is even more pronounced in this case because the
5 Town has a small police force of 14 sworn officers, all of whom (including the Chief) are
6 required to perform patrol duties. [SOF 6, 21]

7 Against this backdrop, Plaintiffs' allegations could be reasonably expected to: 1)
8 create discord between members of a small department who must work together closely
9 to perform important public safety functions; (2) undermine the authority of the Chief of
10 Police, who is the leader of a paramilitary organization that relies on chain of command;
11 (3) divert important Town resources into a large scale investigation; (4) potentially
12 endanger the lives of police officers and the public by breeding animosity between co-
13 workers who might be called upon to back each other up in dangerous situations; and (5)
14 cause members of the public to lose trust in the police, thereby impairing the
15 department's ability to provide effective law enforcement services. Based on these
16 concerns alone, the Court should conclude that the *Pickering* balance weighs strongly in
17 favor of the Town, and therefore grant summary judgment for Defendants.

18 However, and even though these reasonable predictions would be sufficient to
19 support summary judgment in favor of Defendants, the Court need not rely solely on the
20 mere possibility that Plaintiffs' complaint could be disruptive. Here, the record is replete
21 with undisputed evidence that each of foregoing concerns became a reality.

22 Once the complaint became common knowledge, an atmosphere of distrust,
23 divisiveness, and discord became prevalent in the department. According to Plaintiffs,
24 Sgts. Garcia and Schultz took the Chief's side, while ten employees (including all of the
25 Plaintiffs) were opposed to the Chief. [SOF 65-68] Indeed, Plaintiffs themselves
26 testified regarding the following detrimental impact on the department after the
27 complaint:
28

1 • Frakes acknowledged that the department was divided and suffered from
2 low morale in the aftermath of the complaints, and testified that he personally observed a
3 deterioration in the relationship between Chief Gilbert and Plaintiffs. Frakes also
4 witnessed friction between Plaintiffs and the Chief's supporters, which made it more
5 challenging to provide effective law enforcement services. In addition, Frakes cited two
6 occasions on which he felt that the Chief or his supporters failed to provide appropriate or
7 timely backup in potentially dangerous situations. [SOF 69-75]

8 • Ponce agreed that there was a lack of trust between Plaintiffs, on one hand,
9 and the Chief and his supporters, on the other hand. Ponce also confirmed that his
10 relationship with Chief Gilbert worsened after the allegations became public. In addition,
11 Ponce was concerned about whether he could rely on the Chief and the Chief's supporters
12 for backup, and became fearful for his own safety. [SOF 78-82]

13 • Yeomans testified that the atmosphere of divisiveness caused him anxiety
14 about his ability to perform his job as a police officer. Yeomans also confirmed that the
15 effectiveness of the department suffered, stating, "Nobody was doing traffic stops.
16 Nobody was being proactive. They were just responding to emergency calls. . . . The
17 morale of the department was on the floor." [SOF 77, 83]

18 • Norris testified that Chief Gilbert became more difficult to contact after the
19 complaint. Moreover, she heard that he ignored a call for backup from a complaining
20 officer. [SOF 84-85]

21 • Conley noticed that there was tension between the Chief and the other
22 officers, and that the Chief no longer spoke to the complainants. As a result, she found it
23 very stressful to work in the police department. In addition, Conley did not have
24 confidence that the Chief and the Chief's supporters could work effectively with the other
25 officers, since there was a lack of trust between the two groups. [SOF 86-87]

26 Not only did Plaintiffs' complaints disrupt the police department, but it forced the
27 Town to invest significant resources in retaining a third party to conduct a comprehensive
28 investigation into the allegations against Chief Gilbert, which involved interviews of

1 every police officer and took more than a month to complete. [SOF 175-77] As this
2 Court has recognized, the disruptive impact of an investigation weighs in favor of the
3 employer in the *Pickering* balance. *See Carboun*, 2005 U.S. Dist. LEXIS 21950, at *16
4 (“[T]he Letter caused the City Manager to institute a substantial internal investigation. . .
5 . Such an investigation consumes resources and distracts attention from the daily
6 business of police work, carrying the potential for hindering the effective operation of the
7 department.”) (internal citations omitted). In addition, the Town conducted a second
8 investigation on the issue of whether Plaintiffs had made false allegations of misconduct
9 by the Chief. [SOF 178-79, 182] During that time, the Town placed Plaintiffs on
10 administrative leave pending the outcome, which resulted in an increase in crime in the
11 Quartzsite community. [SOF 182, 185]

12 As another relevant factor, Plaintiffs also fanned the flames by publicizing their
13 allegations, which resulted in a combustible, toxic, and divisive atmosphere within the
14 Town. [SOF 96-102] As the Ninth Circuit has expressly recognized, police officers are
15 charged with preserving the integrity and image of the department, and therefore, speech
16 that results in public denigration of the agency loses its protection. *See Dible v. City of*
17 *Chandler*, 515 F.3d 918, 928-29 (9th Cir. 2008). These precise circumstances exist here.

18 Plaintiffs made efforts to publicize their complaints at two Town Council
19 meetings, both of which degenerated into raucous affairs. On June 1, 2011, a crowd of
20 approximately 200 people showed up for a special meeting regarding the Plaintiffs’
21 complaints, but there was no quorum. [SOF 90-93] The crowd became loud and
22 disruptive, and people began shouting, “get rid of him,” in reference to the Chief. [SOF
23 93-95] Unfortunately, the situation escalated further at a June 14 meeting, at which
24 Plaintiffs distributed written materials regarding their complaint and authorized a
25 spokesperson to make a public statement regarding their complaints. [SOF 104, 109]
26 Plaintiffs and their supporters wore red at the meeting to signify their opposition to the
27 Chief, and the Chief’s supporters wore blue, further emphasizing the deep division within
28 the department. [SOF 105-108] The undisputed evidence (including Plaintiffs’

1 testimony) shows that there was heightened tension, yelling, and animosity between the
2 factions. In fact, the meeting escalated to a near riot, and the Chief was concerned for
3 public safety. [SOF 108, 110-14]

4 At the close of the meeting, two police officers struggled to arrest an opponent of
5 the Chief who was behaving in a disorderly manner. [SOF 115] Significantly, none of
6 the Plaintiffs intervened to help their colleagues with the arrest; instead, Plaintiffs stood
7 with their backs to the wall. [SOF 116] In the Chief's view, this incident confirmed the
8 critical fracture within the department, and likely caused the community to lose trust in
9 the department. [SOF 117-18]

10 The public disruption also spilled over into the community. Plaintiffs noticed that
11 citizens were choosing sides between the Chief and the complainants, and showing their
12 support by wearing red or blue – conditions that were detrimental to effective law
13 enforcement. [SOF 8-9, 16-17, 101-02, 124-25] In addition, Ponce experienced backlash
14 in the community, and Frakes observed the Chief's supporters following him and
15 photographing the Plaintiffs' homes. [SOF 76, 119] The public disruption also
16 manifested itself in media reports that portrayed the police department and community in
17 an unflattering light. [SOF 120-22] As the Ninth Circuit has recognized, "police officers
18 are quintessentially public servants and part of their job is to safeguard the public's
19 opinion of them." *Dible*, 515 F.3d at 929. Here, Plaintiffs utterly failed at this important
20 responsibility.

21 In sum, Plaintiffs' false allegations are worthy of little or no protection. In
22 contrast, the Town's interests are so strong as to not just tip the balance in its favor,
23 but to break the scale. The undisputed evidence shows that Plaintiffs' speech divided
24 the department, impaired the efficiency of law enforcement, consumed the Town's
25 resources, potentially endangered public safety, divided the community, and publicly
26 discredited the Town. If Plaintiffs' speech does not lose its protection under these
27 circumstances, then the *Pickering* balance will be eviscerated.

1 **III. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO IMMUNITY.**

2 Even setting aside the fact Plaintiffs' speech was unprotected, the individual
3 defendants are entitled to summary judgment for multiple reasons. As an initial matter,
4 the record is devoid of any evidence that Town Manager Alex Taft or Chief Gilbert were
5 involved in the termination Plaintiffs' employment. Instead, the undisputed evidence
6 shows that Assistant Town Manager Al Johnson was the sole decisionmaker, and that
7 Johnson never consulted Taft or Gilbert on the subject. [SOF 1, 179-84, 195-98] While
8 Plaintiffs may contend that Taft and Gilbert must have been involved in a purported
9 conspiracy to retaliate against them, it is well-settled that a party cannot rely on
10 unsupported and self-serving speculation to defeat summary judgment. *See, e.g.,*
11 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (stating that
12 "this court has refused to find a genuine issue where the only evidence presented is
13 uncorroborated and self-serving testimony") (internal citation omitted); *Villodas v.*
14 *Healthsouth Corp.*, 338 F. Supp. 2d 1096, 1104-05 (D. Ariz. 2004) (same).

15 Even if Taft and Gilbert were involved in the termination decisions (which they
16 were not) all three individual defendants are immune from liability as a matter of law. As
17 public officials, the individual defendants are entitled to qualified immunity unless
18 Plaintiffs prove that they violated "clearly established statutory or constitutional rights of
19 which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818
20 (1982). Plaintiffs cannot meet this lofty burden.

21 As discussed above, Plaintiffs' speech was unprotected based on, among other
22 things, the falsity of the sick/vacation allegations; the reckless manner in which they
23 failed to investigate the allegations before accusing the Chief of serious misconduct;
24 Plaintiffs' self-serving motives for making the accusations; Plaintiffs' callous disregard
25 for the chain of command – a critical element of a paramilitary organization; the
26 deleterious impact of the allegations on the efficient operation of the police department;
27 and the resulting fracture among citizens, which manifested itself in raucous and rowdy
28 disputes at Council meetings and threatened to tear at the very fabric of the community.

1 For these same reasons, the Court must conclude that Plaintiff's rights (if any) were not
2 clearly established.

3 As the Ninth Circuit has observed: "Because the underlying determination
4 pursuant to *Pickering* whether a public employee's speech is constitutionally protected
5 turns on a context-intensive, case-by-case balancing analysis, the law regarding such
6 claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified
7 immunity under *Harlow* and its progeny." *Moran*, 147 F.3d at 847. Given the
8 overwhelming and undisputed evidence of the actual disruption caused by Plaintiffs'
9 false allegations against the Chief, Plaintiffs cannot seriously contend that this is the rare
10 case in which qualified immunity does not apply. For this additional reason, the
11 individual defendants are entitled to summary judgment on the First Amendment claims.

12 Finally, for the same reasons that the individual defendants are entitled to qualified
13 immunity, there is insufficient evidence to support an award of punitive damages, which
14 requires proof of an evil motive or intent, or a reckless disregard of federally protected
15 rights. *Broulette v. Starns*, 161 F. Supp. 2d 1021, 1028 (D. Ariz. 2001).

16 **IV. PLAINTIFFS' CLAIMS UNDER A.R.S. § 38-532 ARE BARRED AS A**
17 **MATTER OF LAW BECAUSE THEY HAVE ALREADY HAD THEIR**
18 **DAY IN COURT.**

19 Arizona Revised Statute § 38-532(H) provides that certain employees who believe
20 they have been terminated for whistleblowing may file a complaint with the State
21 Personnel Board. Plaintiffs here chose that remedy.⁴ [SOF 209] After briefing on the
22 merits, four different hearing officers all concluded that Plaintiffs failed to make out a
23 case as a matter of law. [SOF 210] The hearing officers' recommendations went to the
24 State Personnel Board, which adopted the hearing officers' recommendations on a
25 unanimous vote. [SOF 211] Pursuant to A.R.S. § 38-522(I), losing parties who avail
26 themselves of this procedure may appeal the State Personnel Board's decision to the

27 ⁴ Plaintiff Conley did not choose the administrative remedy, but that is because she had
28 no administrative claim and has no claim here because she was not a law enforcement
officer. Consequently, she is not a covered employee who can bring a claim pursuant to
A.R.S. § 38-532. See A.R.S. § 38-531(1) and (3).

1 Superior Court under Arizona's Administrative Review Act, which requires that any
 2 appeal be filed within 35 days of service of the Personnel Board's decision. A.R.S. § 12-
 3 904(A). This deadline has long since run, without Plaintiffs ever filing an appeal to the
 4 Superior Court. Thus, the dismissals of Plaintiffs' 38-532 claims are final and binding.

5 Whether the issue is framed in terms of issue preclusion, res judicata, or even
 6 election of remedies, Plaintiffs cannot get a second bite at the apple by seeking redress
 7 from this Court on a claim that they chose to litigate through the administrative process
 8 set forth in A.R.S. § 38-532. *See, e.g.*, Restatement (Second) of Judgments § 83(1)
 9 (1982) (If an administrative adjudication has the essential elements of an adjudication,
 10 and preclusion is consistent with the scheme of remedies, then "a valid and final
 11 adjudicative determination by an administrative tribunal has the same effects under the
 12 rules of res judicata, subject to the same exceptions and qualifications, as a judgment of
 13 a court"); *see also* 25 Am. Jur. 2d Election of Remedies § 1 ("[A]n election of remedies
 14 is the act of choosing between two or more different and coexisting methods of
 15 procedure and relief allowed by law on the same set of facts, where a party has but one
 16 cause of action, one right infringed, and one wrong to be redressed."). Even if the
 17 Court allowed Plaintiffs to re-litigate the claims here, the claims would still suffer from
 18 the fatal flaws identified in the briefing before the State Personnel Board. [SOF 210-
 19 11] As such, the Court should award summary judgment as a procedural and
 20 substantive matter.

21 **V. PLAINTIFFS' DEFAMATION CLAIMS HAVE NO MERIT.**

22 Frankly, it is difficult to identify what specific comments were made by
 23 Defendants that Plaintiffs view as defamatory. They identified none in the original or
 24 amended complaints. And in their depositions, some plaintiffs appeared not even to
 25 know that they were asserting such a claim. For example, when Plaintiff Norris was
 26 asked if she was asserting a defamation claim against the Town or any of the defendants
 27 in this case, she responded, "I don't know what you mean." [SOF 212] To clarify, she
 28 was asked, "are you suing for defamation?" to which she again responded, "I don't know

1 what that is. I'm sorry." [SOF 213]

2 It gets worse. Plaintiff Yeomans testified in his deposition that he has never even
3 reviewed either the original or amended complaints filed on his behalf (which is
4 problematic in and of itself). [SOF 214] But in light of the fact that he has never
5 reviewed the complaints, it's not surprising that when asked what it was that Defendant
6 Gilbert allegedly did to defame him, he had no concept of what such a claim is and
7 responded only that Gilbert defamed him "by not recalling all the incidents that he had
8 with me." [SOF 215] This statement is just one example among many demonstrating the
9 utter lack of evidence that any of the Plaintiffs have put forth in this litigation to establish
10 the elements of a defamation claim, which is grounds for summary judgment in favor of
11 Defendants. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) (holding that
12 summary judgment must be entered "against a party who fails to make a showing
13 sufficient to establish the existence of an element essential to that party's case, and on
14 which that party will bear the burden of proof at trial."). That is particularly true in light
15 of the fact that as law enforcement personnel, Plaintiffs are public figures and must prove
16 the higher "actual malice" standard by clear and convincing evidence in order to establish
17 liability. *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286, 290 (1993); *Godbehere v.*
18 *Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343-44, 783 P.2d 781, 790-91 (1989); *see also*
19 *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 282, 812 P.2d 1096, 1100 (Ct. App.
20 1991); *see also Carboun*, 2005 U.S. Dist. LEXIS 21950, at *25 (clear and convincing
21 standard must be taken into consideration in ruling on summary judgment). Because
22 Plaintiffs cannot do that, summary judgment is appropriate.

23 CONCLUSION

24 For the foregoing reasons, Defendants respectfully request that the Court enter
25 summary judgment in their favor on all claims.
26
27
28

1 RESPECTFULLY SUBMITTED this 28th day of September 2012.

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3
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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on September 28, 2012, I electronically transmitted the
12 attached document to the Clerk's Office using the CM/ECF System, and an electronic
13 copy was forwarded by the Court to the following CM/ECF registrant.

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22 4812-8399-4896, v. 1